

UNITED STATES DISTRICT COURT
DISTRICT COURT OF

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

LARA-MARTINEZ, CESAR

DEFENDANT,

CASE NO: _____
(To Be Assigned By Clerk)

CASE # **2007CR2903-JLS**

NOTICE OF MOTION:

MOTION TO VACATE AND CORRECT
SENTENCE PURSUANT UNDER 28
U.S.C. 2255.

TO THE CLERK OF THE COURT, UNITED STATES DISTRICT COURT, FOR
THE DISTRICT COURT OF CALIF. PARTIES AND THEIR COUNSEL.

MOTION

Notice is hereby given the defendant, **Mr. LARA-MARTINEZ**
proceeding in Pro Se, now moves this Honorable court to vacate
and correct sentence pursuant to title 28 U.S.C. 2255.

This motion is based on the files and records in this case,
the following memorandum of points of authorities in support and
such further argument as this court may order.

The defendant's reserves the right to the records on these
issues and any other to be raised by the plaintiff, it's reply
to defendant's motion to vacate and correct sentence pursuant to
28 U.S.C. 2255.

///

MEMORANDUM OF POINTS AND AUTHORITIES

1.
1.

CONSTITUTIONAL ISSUES

The defendant was denied effective assistance of counsel at sentencing, the sixth amendment to the United States Constitution provides that "(I)n all criminal proceedings the accused shall enjoy the right....to have assistance of counsel for his defence. Gideon Vs. Wainwright, 372 U.S. 335, 342 (1963) and the right to effective assistance of counsel Cuyler Vs. Sullivan, 446 U.S. 335-45)1980).

2.

STATEMENT OF THE CASE

Defendant was convicted and sentenced to a term of **24** months to be served in case # **2007CR2903-JLS**

offence code : **171**

of/chg : **8 USC 1326(A) and (B) DEPRTEd ALIEN FOUND IN THE UNITED STATES (count 1)**

CASE # **NONE**

of /chg : **NONE**

3.

ARGUMENTS

Defendant is entitled to a vacation and correction of sentence pursuant to title 28 U.S.C. 2255, due to the ineffective assistance of counsel at sentencing.

**A. NEW CONSTITUTIONAL LAW JUSTIFIES THIS
DOWNWARD SENTENCE DEPARTURE REQUEST.**

A downward sentence departure from the federal sentencing guidelines is authorized by 18 U.S.C. 3553(b) when "an aggravating or mitigating circumstance exist that was not adequately taken into consideration by the sentencing commission on formulating the guide lines.

2.

1 See Koon Vs. United States, 518 U.S. 81, 92 94 (1996) the recent
2 decision of the United States Supreme Court in Blakely Vs. Washing
3 ton, 2004 U.S. LEXIS 4573 (06-24-2004), justifies this downward
4 departure request and must be reviewed DE NOVO with all applicable
5 case laws. The ninth circuit court has held that this clarification
6 by Blakely applies the Apprendi limitation to Enhancement of guide
7 lines sentencing ranges. United States Vs. Ameline, 2004 U.S. App.
8 LEXIS 15031 (9th Cir. 7-21-2004); United States Vs. Booker, 375 F.
9 3d 508 (7th Cir. 2004); United States vs. Fanfan, No. 03-47 2004
10 WL 1723114 (D.ME. June 28 2004) cert.granted.
11 Ring Vs. Arizona, 536 U.S. 584 (2002) See also United States Vs.
12 Olano, 507 U.S. 725 (1993).

13 B. DEFENDANT IS ENTITLED TO A POST CONVICTION DOWNWARD
14 DEPARTURE UNDER U.S.S.G. 5K2.19

15 Defendant who was arrested on **09-22-07** and was sentenced on
16 **11-02-2007** and had maintained a clear conduct, and has been making
17 efforts at rehabilitating himself is entitled to a post conviction
18 downward sentence departure under U.S.S.G. 5K2.19.

19 The sentencing commission chose to prohibit the consideration
20 of only a few factors, and no otherwise to limit as a categorical
21 matter, the consideration which might bear upon the decision to
22 depart downwards. Obviously, Post Conviction, rehabilitation is not
23 one of these prohibited factors, nor have the courts found any
24 other provision of the guidelines, policy statements of official
25 commentary of the sentencing commission prohibiting it's considera
26 tion. The court decided in United States Vs. Rhodes, 145 F. 3d
27 1375 (D.C. Cir. 1998) that sentencing courts may consider post
28 conviction rehabilitation at re-sentencing.

///

1 See also United States Vs. Core, 125 F. 3d 74, 75 (2nd Cir. 1997)
 2 finding nothing in the pertinent statutes or the sentencing guide
 3 lines, that prevents a sentencing judge from consideration of post
 4 conviction rehabilitation in prison as a basis for departure if
 5 resentencing become necessary" cert. denied. 118 s.ct. 735, 139 L.
 6 3d 2d 672 (1998). U.S. Vs. O'neal, 180 F. 3d 115 (C.A.4.)(N.C.)1999).
 7 United States Vs. Rudolph, 190 F. 3d 720 (C.A.6.)(Mich)(1999).

8
 9 **C. INEFFECTIVE ASSISTANCE OF COUNSEL
 IN FAILING TO FIGHT CERTAIN RIGHTS.**

10 Request this Honorable Court grant him a 2 points down departure
 11 as consequence of his status as a deportable alien which has been
 12 considered as a mitigating factor of sentencing pursuant to United
 13 States Vs. Gaither, 1 F 3d 1040 (10 Cir. 1993) counts may properly
 14 depart downward from sentencing guidelines if sentences commission
 15 did not account for mitigating factor. In United States vs. Smith, 27
 16 F.3d the circuit court remanded to trial court for recenting due
 17 to the defendant's ineligibility for pre release custody and minimum
 18 security confinement as a result of his status as a deportable
 19 alien constituted a mitigating factor to be considered by the trial
 20 court. See also United States Vs. White, 31 f. 3d 920, 922 (1995)
 21 trial court, Granted defendant 6 months departure in accordance
 22 with smith because defendant was a deportable alien, further in
 23 memorandum to all federal procecutors (exibiti) dated April 28 1995
 24 the attorney general instructs federal prosecutors to recomend one
 25 or two level downward departure in exchange for the aliens consecion
 26 of deportability.

27 //

28 ///

D. THE STRICKLAND STANDARD.

To establish ineffective assistance of counsel, a defendant must show that (1.) counsel's performance was deficient and (2.) the deficient performance prejudiced him.

Strickland Vs. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct 2052, 80 L. Ed 2d 674 (1984).

It is well decided by courts that misrepresentation and misadvisement of the likely outcome of a plea, combined with erroneous advice on the possible effects of going to trials, fall below the level of competency required of a defence attorney.

The court in Armstron Vs. Dugger, 833 F. 2d 1430 have equally decided that a failure of counsel to investigate or present mitigating evidence at sentencing, as in the instant case, may qualify as deficient performance under Strickland.

Under the first prong of Strickland, it is undisputable that defence counsel misrepresented and misadvised the plea to defendant about the condition of his plea bargain when specifically enquired by defendant, in as much as counsel knew that defendant's whole behaviour and guilty plea was structured to avoid a plea agreement that would not result in a long sentence or prison time.

Defendant, Invoking this knowledge and now detrimentally relying on counsel's advice, pled guilty to the charge. All this constitutes ineffective assistance of counsel I ask that this Honorable court downward departure from this argument.

///

///

///

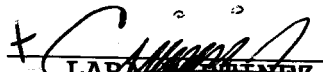
///

CONCLUSION

All of the foregoing constitutes ineffective assistance of counsel and a negation of due process, such that the court must grant defendant's motion to modify and correct sentence pursuant to 28 U.S.C. §§ 2255, as defendant's 5th, 6th and 14th amendments rights to the United States Constitution were thereby violated.

WHEREFORE, Defendant respectfully ask that this Honorable court consider his motion and all DE NOVO case laws, in the most favorable light to defendant, and grant defendant's motion to modify and correct sentence pursuant to 28 U.S.C. §§ 2255.

Sincerely;


LARA MARTINEZ CESAR

DATED: 07-30-2008 .

CERTIFICATE OF SERVICE / OR MAILING

CASE NAME: LARA-MARTINEZ CESAR VS. UNITED STATES OF AMERICA

CASE NUMBER: 2007CR2903-JLS

I, the undersigned, hereby affirmed that on this 30 day of JUNE
2008, I deposited in the recepticle for the United States mail provided
at this Institution for inmates, first class pre-paid postage, in a sealed
envelope and addressed to:

CLERK OF DISTRICT COURT OF CALIFORNIA
CALIFORNIA SOUTHERN DISTRICT COURT
4290 Edward J. Schwartz
Federal Bldg.
880 Front Street
SAN DIEGO, CA. 92101

a true and correct copy of the attached document(s) identified as follows:

MOTION TO VACATE AND CORRECT
SENTENCE PURSUANT UNDER
U.S.C. 2255
(1) Original
(2) Copy

In accordance with Houston V. Lack 487 U.S. 266 (1988) these documents are deemed
filed and served as of this date. Pursuant to 28 U.S.C. §1746(2). I further
declare under the penalty of perjury that the foregoing is correct and true.

DATED: 07-30-2008


AFFIANT

JS44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of indexing and filing. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Cesar Lara-Martinez

DEFENDANTS

United States of America
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *RM* DEPUTY

AUG - 4 2008

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Cesar Lara-Martinez
PO Box 3001
California City, CA 93504
51329-198

ATTORNEYS (IF KNOWN)

U.S. Attorney

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PT | DEF | | PT | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2255

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> Marine <input type="checkbox"/> Miller Act <input type="checkbox"/> Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury-Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. <input type="checkbox"/> Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (13958) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSL (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reappointment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Tort to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input checked="" type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights			

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions):

JUDGE

Docket Number

DATE 8/4/2008

SIGNATURE OF ATTORNEY OF RECORD

Rmiller